

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES	}	No. 53.
<i>v.</i>		
THE TENNESSEE AND COOSA RAILROAD Company, Hugh Carlisle, et al.		

REPLY BRIEF OF APPELLANT.

The brief of the other side, which is quite ingenious and careful, shows—

1. What fallacious deductions from dicta of this court have been misleading the lower courts.

2. That the whole strength of the other side lies in treating as equivalent in authority to statutes some casual remarks of this court in cases between third parties who could not collaterally assert the rights of the Government while the Attorney-General and Congress remained inactive.

3. That although these remarks are obviously dicta, the industrious attorney has—

(a) Failed to show by reason or authority that they were correct remarks, read as he reads them.

(b) That he admits that they can not as so read be reconciled with the authorities as they certainly can not with the obvious intent of the act of 1856.

These dicta are on pages 12, 13, 14, 17, and 21 of the brief, and are all directly or indirectly from the two cases of *Schulenberg v. Harriman* and *Land Co. v. Courtright*, both in 20 Wall. In that volume and on those pages the court is requested to examine them in connection with this reply.

The rights of the Government being declared by the statute of 1856 so that no purchaser could be ignorant of them, and the condition precedent as to all but the first 120 sections being obvious, the appellee's attorney realizes that what he must prove to save the other lands is not *bona fide* purchase, but *a power to sell freely and indefeasibly to any one after the expiration of the ten years*, although the road had not been finished, and that the lands were accordingly sold before September, 1890.

Such a proposition would never have been ventured by any lawyer but for remarks of this court in *Schulenberg v. Harriman*, a case turning upon no question about sales or power to sell, and in *Land Co. v. Courtright*, a case involving only sales *within* the ten years of lands in the first 120 sections.

Take out of the brief these dicta as read by the attorney and he practically admits all that we claim. Deprive the brief all pure and simple dicta and nothing remains.

For example, it is admitted that we have abundant authority for the proposition that a condition of defeasance accompanying an estate goes with the estate into whosoever hands it may pass (unless those of a *bona*

fide purchaser without notice of the condition). The brief merely quotes a remark in the *Schulenberg Case* and says that, owing to the conflict between the remark and all the authorities, the authorities are "inapplicable" (p. 15).

It would seem that the attorney, if the dicta as he reads them were good law, would have been able to find some confirmation of them in some cases or, at least, give reasons in support of them. But he can not do either.

Should he attempt it either the dicta or his construction of them would quickly give way. He discreetly avoids the attempt. In *United States v. Wong Kim Ark* (169 U. S., 679), this court, in an elaborate opinion, decided that children born of foreigners domiciled in this country became by the fourteenth amendment to the Constitution, citizens. In 16 Wall, 73, the court had said: "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States, born within the United States."

In disapproving this proposition the court, in *Wong Kim Ark*, quoted a wise and important observation of its own, made through Chief Justice Marshall:

It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the *case* in which those expressions are used. If they go beyond the case they may be respected, but *ought not to control the judgment* in a subsequent suit when *the very point* is presented for decision. The reason of this maxim is obvious: The *question* actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are con-

sidered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

If the court will ponder this observation and fully realize its pertinency to the arguments in this case, it will see the injustice to itself of quoting as its combined wisdom, fully weighed and agreed upon, sentences in an opinion necessarily written by only one of its members and having no direct bearing upon the judgment it was rendering concerning a distinctly presented, distinctly argued, and distinctly discussed and adjudged point, issue, or question.

That issue was, could the State by statute protect the land from timber trespass after the ten years had expired? No question of the right of the State to dispose of it, subject or not subject to rights of the United States, was at issue, nor any question about the effect of the United States claiming their rights. So far as third parties who were trespassers were concerned, they could not take advantage of any rights of the United States. That was "the very point" of the *Schulenberg* controversy.

There was no reason why the State could not protect the lands in the same way if they belonged to the United States and had never been granted.

But the brief of the other side not only ignores the maxim quoted; it ignores another proposition equally simple and important to remember, namely:

Even when the *thoughts* of the court or of the single writer of the opinion are correct, language is often used which can not be extracted from the context and considered in disregard to the question litigated without giving a wrong impression as to what those thoughts really are.

This is notably the case with the large capital quotation on page 21 of the brief, from an opinion by the lamented and able Justice Field in the Courtright Case.

In writing that, Justice Field assumed that the statute and question he was discussing would be kept in mind, and also the context. What he means to say, and what his words, properly considered, sufficiently do say, is simply this, that the statute attached a condition to the *alienation* of all lands not in the first 120 sections and no condition to the alienation of the rest. This is his meaning. A fee simple estate was given the State as to all the lands, with a provision for defeasance attached to all the lands. All were accompanied by a power of alienation and to all a good *indefeasible* title could be given to the purchaser. But the 120 sections had no condition attached to this *power of alienation*; they could be sold *immediately*, and the condition to sell them from time to time, only as the work progressed and only after 20 miles had been built and certificate made of the fact—these being the conditions attached to the power of fully and indefeasibly alienating the *others*—were wholly lacking. The State was trusted to apply the lands properly; it was not required to *build and certify first* and then sell. But the justice did not understand that he was saying anything more than, or different from, what the statute said. He was talking about the terms and meaning of the statute. He did not understand that he was saying more than that there was no condition to be fulfilled “in the *disposition* of this quantity” with a perfect title to it. The defeasance provision as to the lands was not a condition attached to the alienation of title of *any* of them. It had no more to do with the power of

alienating one part of them than the other. *Either* kind could be sold indefeasibly within ten years, the one kind upon the performance of certain conditions, the other without performing any, and *neither* kind after ten years, the road being uncompleted.

Justice Field himself, in the same and also in another case, shows what he meant to say and all he meant to say. In *Farnsworth v. Minnesota and Pacific Railroad Company* (92 U. S., 65), he says:

The act of Congress granting lands to the Territory of Minnesota imposed conditions *upon their alienation*, except as to the first 120 sections, which the Territory could not disregard. * * * The evident intention of Congress was to *secure* the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of the first 120 sections. The act made the construction of portions of the road a condition precedent to a conveyance of any *other* parcel by the State. No conveyance in disregard of this condition would pass any title to the company. It was so held by this court in *Schulenberg v. Harriman*, etc.

Even, therefore, if his language had the force of the statute of 1856 and could amend it or set it aside, it has been misunderstood. He did not mean to say by the language quoted that at the end of ten years *further* sales of these lands *could* be made and that the unsold lands or any of them should *not* revert to the United States, if the road had not been completed in the meantime.

His language may go too far if Justice Field meant,

by his broadly worded phrases, to say that the first 120 sections could be sold otherwise than "only as the work progresses," including, perhaps, "preliminary work," such as surveying, etc. The clear intent seems to be that the first 120 sections were to complete the first 20 miles and the next 120 the next section. Preliminary work was a small matter that Congress does not seem to us to have provided for. It was merely "aiding" the State to build.

The question before him in this Courtright Case was, could a sale of 120 section lands be made in 1857 with good title, although no section had been built and no condition complied with, and he answered that it could, because as to these 120 sections no building of road or the like was a condition of alienating, as it was a condition of alienating with like title, the other lands.

That was "*the very point*" decided in this Courtright Case.

Of course, if the road was to be finished within ten years, *a fortiori* 20 miles of it were to be built within ten years, and *a fortiori* preliminary work was to be done within ten years. Congress did not think it necessary to say expressly that what had to be finished within a given time had to be begun within it—that the 120 sections whose proceeds were to build the first 20 miles and furnish preliminary work were to be sold within the ten years and so early that it would be practicable to finish the road within the ten years, since they could be sold only to accomplish that. This was necessarily and emphatically implied, and the Courtright opinion means

nothing to the contrary, for the sales approved in it took place in 1857, and therefore sales after ten years were not under consideration.

The most serious error of the brief on the other side, however, is in regard to the Schulenberg quotation (p. 13). The learned counsel says (p. 15), that the power *to give a perfect title* was just as good after "as before the breach."

But what is the dictum of the court? "A cessation of sales in that event is implied in the condition that the land shall then revert; *if* the condition be not enforced the power to sell continues as before the breach, limited only by the objects of the grant and the manner of sale prescribed in the act."

"Continues as before the breach" would seem to mean simply "sales can still be made," and not "remains the same kind of a power and has the same effect in all respects." Or rather, in such a mere dictum, the justice probably had no very definite meaning beyond a denial that all power to sell was at an end so far as collateral proceedings of third parties were concerned.

When we consider that the justice is not ignoring, but discussing, the very condition itself and in its relations to a case between third parties, the meaning of this language can not well be mistaken for an affirmance that there is no such condition at all, or that it is to have no effect whatever in any circumstances. "If" it be not enforced by the grantor, who alone can raise any question about it, the power of sale continues, because the rights are the grantor's and these third parties have no power to enforce the stopping or rely on it in any way

whatever; but the power of sale continues, *even as to them*, only when the sales are limited to the objects of the grant and the manner of sale prescribed in the act, any other sale being altogether *void*, instead of void as against the grantor, and to be collaterally attacked. The justice is speaking not directly of the condition that the road shall be constructed, but the provision or "*condition that the land shall then revert*," which, he says, implies also "*a cessation of sales*."

A greater misreading of a dictum could not well be made than to say that this means that "if" the condition is enforced by the grantor—the "condition" that sales shall then cease and the lands then revert—all sales shall be regarded, nevertheless, as giving a perfect title as against him. The learned justice's dictum was better understood by the supreme court of Alabama. (*Swann & Billups v. Miller*, 82 Ala., 538, 539.) It says: "The mode and time of sale prescribed in the act must have been complied with in every essential particular * * * It can scarcely be contended that a sale made in contravention of the letter and policy of the law is merely voidable. It can not be other than void *ab initio*." *Schulenberg v. Harriman* is twice cited in support of that proposition; and in *Mathis v. Tennessee & Coosa* (83 Ala., 415), after saying that the first 120 sections could be sold "without first taking any steps toward the construction of the road" and calling *this* an "absolute, unconditional right of sale," the court says: "We judicially know that the Government of the United States has taken no action declaring a forfeiture of the lands it had granted," *Schulenberg v. Harriman* being again cited.

This is the probable meaning of the dictum, that "if" the United States does not make the point that the sales shall then cease, *no one else* can question a sale after the ten years, unless that sale is *void ab initio*, because not confined to the objects of the grant and the manner of sale prescribed in the act. Those objects and that manner of sale limited the selling power so that any sale at any time or under any circumstances outside of those limits was absolutely void for all purposes and *as to all persons*. It was *ultra vires*. (*Morton v. Nebraska*, 21 Wall., 660; *Newhall v. Sanger*, 92 U. S., 761; *Wright v. Roscherry*, 121 U. S., 488; *Burfeen v. Chicago*, 163 U. S., 321.) Whereas, the cessation of sales made in conformity with the law was, so this dictum means, a matter with which third parties had nothing to do. It was unimportant *if* the grantor did not enforce it, since it was no one else's business should the sales continue.

The dictum does not undertake to say what would happen if the grantor were present in the controversy asserting his rights, except by intimating that the situation would be altogether different.

We think the dictum might have said that a sale after the ten years was thus *ultra vires*, and that it is contrary to familiar principles to say that the prohibition to make one "added nothing" to the force of the provision that the lands should then revert. That makes a positive and independent provision of law mere surplusage. Congress was not satisfied with the "implication" from the "reverting" and positively forbade further sales. This is further law and must be given a *further* effect,

not treated as identical with the provision as to reverting and thereby rendered vain surplusage. Congress had in mind first and expressed a prohibition to sell after ten years. The question then remained, what shall happen to the lands, and Congress decided that those not sold, and only those, should revert, and so expressed itself. This was the plan and these the thoughts of Congress, and we can not say that Congress meant anything less than or different from that plan and those thoughts so plainly expressed. The provision as to what should happen to the unsold lands did add something to the prohibition of further sales, and by treating this prohibition as a positive order all the language of Congress becomes effectual. That, *therefore*, is the proper construction. Any sales after ten years were thus prohibited by law and therefore null and void as to all the world.

Counsel makes the mistake of confounding two powers to sell—that expressly given by the act and expressly limited to ten years, and that arising merely from having title (always supposed to be alienable) after breach of a condition subsequent. The former gave a right to sell an indefeasible title; the latter the power to sell as in other cases of *having title* after breach—that is, subject to the grantor's right to take advantage of the breach—a right which would be meaningless if a perfect title could be given. Of course the supposed alienability of title ignores the express restraint upon selling in the act of 1856, but that seems to have been construed as surplusage.

But in this case the grantor *has* enforced and *is* enforcing the "condition" that sales shall "in that event" cease. It is unnecessary to discuss separately the quotations from

Secretaries Lamar and Noble. They proceed (rightly or wrongly) on the supposition that no forfeiture having been declared, the Secretary must act accordingly, except the last, which only discusses *bona fide* purchasers. It is still the "if" and decisions made as in *collateral* proceedings, not the question of the effect of a direct judicial or Congressional attack by the grantor. The Secretary was advised in 1878 by the Attorney-General that it was not for the Secretary to enforce the forfeiture and that he could proceed as a third person would and issue patents. Executive officers, and even the lower courts, do not always inquire whether the language of this high court is a dictum or a decision. Whatever it says is assumed to be good law, regardless of "the very point" decided and often of the context also.

The reason usually given for the inability of third persons to make any use of the rights of the grantor, even with his help, is that the law wishes to prevent a transfer of his rights to avoid maintenance. Another reason seems to be that the statute of *quia emptores* reduces the right of every grantor (not being the *chief lord*) to a mere chose in action, and this, of course, was not assignable. Here we have a question as to the chief lord and his rights.

If anything could be a greater misuse of a dictum than the one last discussed, we find it on page 13 of the brief of the other side, where "the time of resumption" is capitalized. The report and the opinion regard a statute of Iowa as reserving a competency to resume the grant, if the road was not built in a certain time. By the terms of the Iowa act the right to the lands was restricted, so

the court says, to such lands as at the time of resumption had not been previously disposed of. The language was, "Then and in that case it shall be competent for the State of Iowa to resume all rights conferred by this act upon the company so failing, and to resume all rights to the lands hereby granted and remaining undisposed of by the company so failing to have the length of road completed in the manner and time as aforesaid."

What has the construction of this language of this Iowa act to do with our case? Even in the case in which it was employed, the question was not at all whether the time of resumption or the time allowed to complete was to be regarded, but whether the sale was one "dependent upon conditions to be *previously* performed" or was proper because no way affected by *previous* conditions. Our statute says nothing about the competency of the Government to pass a law resuming all the rights given to a company, but that the lands granted shall, at the end of ten years, no longer be sold, but "then revert" to the grantor.

As to the dictum from the circuit court's opinion in *United States v. Willamette Valley Wagon Co.* (55 Fed. Rep., 807), a suit which it required a special act of Congress to induce the Attorney-General to bring, after certificates of the governor, after an act of June 18, 1874, authorizing the issue of patents upon such certificates, after the actual investigation of the road and issue of the patents, the case was expressly decided upon the ground of estoppel, and the dictum, when traced back through the same case in 54 F. R. to same case in 42 F. R., appears to be an application of the dictum in *Schulenberg v.*

Harriman. If that is what *Schulenberg v. Harriman* means, so be it; but if not, then this dictum rises no higher than its source—a mistaken supposition that that is what it does mean. Besides, this saying, capitalized on appellee's brief, page 14, may mean no more than that no forfeiture *would be* enforced in the case supposed, not that legally it could not be.

This court is not likely to be governed by law filtered through what lower courts understand by dicta of its own. If it has ever decided any such proposition, it will consider its own decision at first hand and repeat or overrule it, according to its ultimate belief as to the meaning of the supreme law of the land.

Certainly, if the act of 1856 grants a title on a condition subsequent, that condition subsequent is that the grant shall become void *at the end of ten years*, and not at such time as the Government may see fit to enforce the breach or interfere. It was not to be valid *until* such interference; but *notwithstanding it was void*, third parties could not in collateral proceedings take any advantage of the fact. This is the *Schulenberg* dictum.

Not that we think it important here whether, if the road had been completed in 1867 or thereabouts, as to which the principle *de minimis* or the principle of "substantial performance" might apply, or even completed in 1877, or even 1887, or even before the act of September 29, 1890, and we had the certificate of the governor, which was made the exclusive evidence of proper construction that it was so completed, and if there were nothing in this case but the naked question of a failure to

complete in time, the courts would be bound to interfere on that sole ground.

Neglect and delay continued for many years, and until Congress passed the act of 1890. Prior to that time nothing worth mentioning had been done, and the company could not say, Behold the completed road—behold the certificate of the governor that all is well done and finished, from terminus to terminus; we were simply a few months or a few years late.

But we say that this court has *not* said that a long delay, a substantial delay, in constructing the road would not be a substantial breach of the condition subsequent warranting a recovery, and any dicta of lower courts (if there be any) are mere hasty inferences from that other dictum in *Schulenberg v. Harriman*.

The *reductio ad absurdum* of the dictum in the Schulenberg Case and the dictum in the Courtright Case, as construed by counsel on the other side, is reached by combining them, and from the combination reasoning to the seemingly logical conclusion that the act of 1856 means quite the opposite of what it says. In this process, counsel omits the "if" of the Schulenberg dictum, preferring the word "until." What he means by "this estate" is not clear, but apparently he means "this grant" continues. Unfortunately, the grant as distinguished from the estate, carried on its face a ten years' limit to the granted "unqualified right to dispose of the land;" and the "estate," as distinguished from the grant, could not draw from the common law referred to in the Schulenberg dictum any but a *qualified* right to dispose of the land.

Parts of the brief of counsel on the other side, notwithstanding its conceded ingenuity, are an exhibition of casuistry running into extravagance. On page after page we find propositions which will be to this learned court so manifestly erroneous that we shall not waste words on them. For example, pages 11, 19, 20, 21, 22, 23, 24, 27, and 28. As for the dictum from *St. L., I. M. and Sou. Ry. Co. v. McGee* (115 U. S., 459), I shall only refer to what the court says in *Farnsworth v. Minn. and Pac. R. R. Co.* (92 U. S., 68, p. 24), and remark upon the inconsistency of solicitously protecting the public rights in construing grants and doing the opposite in connection with public rights growing out of their forfeiture. The Beebe Case referred to expressly proceeds on the supposition that the individual *could have sued* and did not, and so he was guilty of laches. Laches can not exist without opportunity, and, moreover, these persons "bought" shortly before our bill was filed. The omission to aver suggested on pages 27 and 28 of the brief may point out a defect in the *answer*. It is not a defect in the bill. The argument at the top of page 20 is fallacious. The Government was not granting lands so much to get part of a road and so much to get a whole road. It wanted a whole road and nothing else. *Sioux City R. R. v. U. S.* (159 U. S., 249). The sales were therefore to stop when the ten years expired, whether the right to sell had attached or not, if the road was unfinished. The only reason all lands were not to revert was to save the rights of legitimate purchasers under the power to sell, and not to donate anything for a fragment of road built. See acts of Congress Aug. 8, 1846 (9

Stat., 83), Aug. 26, 1852 (10 Stat., 30), Sept. 20, 1850 (9 Stat., 466), and numerous similar acts.

But on pages 25 and 26 we find an erroneous argument which needs answer, because not unlikely to mislead unless very carefully examined by the court.

Briefly stated, the argument is that lands in the quitclaim deed, *some* of which were opposite completed road when the act of 1890 passed, were not forfeited by the act of 1890, not confirmed by it, nor in any way affected by it. Before our bill filed, so it is argued, the whole road was constructed, and *then*, not before, the company "earned" the lands; *then* the title of the company became good and complete as to the lands along the ten miles completed before the act of 1890. These are, be it observed, lands outside the first 120 sections.

This is very ingenious, but utterly unsound, even as a question of general principles of "law, justice, and equity."

It assumes what we deny—that time was not of the essence and not of the terms of the granting arrangement of 1856; that our mails and our troops could be kept waiting a whole generation for the road to transport them, and that if the road was completed at any time we lost our right to enforce the forfeiture.

It ignores the object of the grant, to aid the creation of a road. That grant was not a free gift to the State *because* a railroad was built in the State, no matter when, how, or by whom built or owned or whether subject to the burdens of the act of 1856 or not.

The company whose vendee is claiming the title did not complete the road, nor did any company for and on its behalf, nor did any company of the State or for and on behalf of the State complete it. Neither were any of the lands applied to its completion, or the proceeds of sales of them. Nor would anything be gained by the company that did build, or by the State, in consequence of your deciding in favor of the appellees.

The fact is, the general forfeiture act left all rights of way unforfeited, and the Tennessee and Coosa Company sold its right of way to a foreign corporation wishing to make use of it for its own purposes. This corporation may have laid tracks and run trains of its large system across the line, and possibly did so, before our bill filed. We doubt the fact, but regard as irrelevant everything said on the subject. The evidence referred to consists in an answer on cross-examination of a farmer, in 1895, as to whether trains were operated from Gadsden to Guntersville "before the filing of this bill." He says, doubtfully: "My recollection is that they were." It does not appear that he knew when the trains began to run or on what date the bill was filed. And see agreement of counsel on Record, page 137.

But that foreign company had nothing to do with the State of Alabama, or with the act of 1856, or with the land grant; it claims no interest except in the purchased right of way, and would quickly repudiate the obligation to carry the United States mails as provided in the act of 1856, section 5, or troops as provided in section 3.

Again, there is not the evidence required by the act of 1856 that the whole road or any 20-mile section of the road has been properly constructed; nor would the governor, under the circumstances, have misled the United States as to the land grant by giving any such certificate.

Without that certificate there is certainly no "law" for saying that any part of the road has been constructed, so far as any earning of lands under section 4 of the act of 1856 is concerned.

There is neither equity, justice, nor law for this specious contention.

But, further, the act of 1856 says nothing about "earning lands" by constructing the road. What it says is that it hereby grants to the State to be subject to the disposal of its legislature for a purpose and no other, and that the lands are to be disposed of *only* in the manner following:

And *when* the governor of said State shall certify to the Secretary of the Interior that any 20 continuous miles of any of said roads is completed, *then* another quantity * * * may be sold; and so from time to time, until said roads are completed, and if any of said roads is not completed within ten years, no further sale, etc.

In *Furnessworth v. Minnesota and Pacific Railroad Company* (92 U. S., 49) this court held that an act such as was passed by Alabama in 1857 "conveyed, therefore, no title" to the railroad company "beyond the 120 sections." The act of Congress "made the construction of the road a condition precedent to a conveyance of any

other parcel by the State. No conveyance in disregard of this condition could pass any title to the company."

So that this court has held, as to an identical grant, that the title to lands such as these given to the State in 1856 remained in the State and could never be transferred until the condition precedent was complied with. A title never begins or has any kind of existence before the condition precedent to the existence of a power to give it happens.

So the title never went to the Tennessee and Coosa Company, but remained in the State, without power to part with it until it made a certain certificate, which it did not make before our bill was filed, and, for that matter, has never made and could not decently make.

But the State having gone through the form of transferring it and not intending to make any use of it, now that a road has been completed on the same line by another company there is nothing to prevent a decree in our favor as to these lands opposite completed road. (*Sioux City R. R. v. U. S.*, 159 U. S., 249.)

As for the quotation from *Bybee v. Oregon and California Railroad Company*, we see no comfort in that to the other side.

It was, like nearly every case cited, between third parties.

The act under consideration provided that upon failure to complete the road in time the granting "*act shall be null and void*" and the lands not then patented to the company revert. This is what the court was discussing—whether *ipso facto*, as to third parties, the grant was null and void as to *all* lands, or the case merely one like

Schulenberg v. Harriman, and the act null as to *some* lands. It will be observed that Congress itself liberally provided that all the lands should not be forfeited for "failure to complete the last mile." It did not leave the courts to consider that possibility, but made its own provision about it, which the courts must content themselves with interpreting and applying and can not improve upon. The brief omits a very important part of what the court says, namely: "*As to lands theretofore* (i. e., before the time allowed for building expired) *unpatented* the act continued in full force and effect. As remarked by the learned court below: "It is to become 'null,' " etc.

This case of ours, as said in our first brief, is a very simple one. And, as two lower courts have decided against us, the very simplicity of it is embarrassing. We have an embarrassment of riches, as the French say.

If *some* of the lands had been sold within ten years in order to complete the road within ten years;

If *some* of the lands outside the 120 sections had been sold after 20 miles of road built and certified;

If Carlisle, instead of owning a majority of the stock from 1860 or thereabouts, and so controlling or being the company, had been an outsider;

If there had been a single error in certifying by the Department of the Interior;

If there had been a single act of the Government tending to estop it;

If the Government stood like an individual in regard to laches;

If, even between individuals, silence and inaction were

a waiver of breach, instead of the law being well settled to the contrary ;

If a purchaser does not take, *subject to the trust*, lands sold by the holder of a legal title held in trust to be conveyed to the equitable owner (*Carroll v. Safford*, 3 How., 441);

If, though late, the company had diligently and faithfully proceeded to sell lands, raise money, and complete the road ;

If the first 5 miles had been built by the company, and not another company and all the rest, but five miles, by a third company ;

If Carlisle could have shown *some* ignorance of the law or facts affecting his purchases ;

If his quitclaim deed had not been for lands many of which are not opposite constructed road ;

If it had been a warranty deed ;

If the whole road had been finished in 1867 or thereabouts so as to present a "substantial compliance" with the condition ;

If the provision as to further sales in the act of 1856 had not been as simple as it was, to laymen and to lawyers ;

If the rights of the Government had been in such a position that *any* purchaser *could be* a purchaser without notice ;

If the testimony of Carlisle and his friends had been straightforward and frank, instead of the opposite ;

If the lands unpaid for had really been "part of the land conveyed to Carlisle" (Appellee's brief, p. 9) ;

If the eleven bonds had been deposited in 1860 (ditto,

p. 6), instead of at some vague time "after the war" (Rec., p. 147);

If his debt thus secured after the war could have been restrainable or reducible by any known method to credible proportions;

If he had, as he thought, lost the *only* minute book;

If, adopting the other side's theory of the act of 1856, sales to other than settlers had not been expressly forbidden by the act of April 10, 1869;

In short, if there had been a single thing unfavorable to the Government's claims or diminishing its equity as to *any* part of the business or *any* of the lands, we should find it easier to argue the case.

But there is really nothing to argue. There are no two sides to the question. There seems to be nothing doubtful about either the facts or the law on which to base a decision in our favor.

And yet the case comes here with an affirmed decision the other way, based upon a mere misread dictum in the *Schulenberg* case and a manifestly erroneous denial of the Attorney-General's power to enforce forfeitures by suit.

Even the attorney for the other side practically admits the error of this last proposition on pages 25 and 26 of his brief, although, naturally enough, he does not expressly discredit an opinion in his favor (p. 27).

That the *Schulenberg* dictum about the power to sell did, contrary to the maxim of Chief Justice Marshall, "control the judgment in a subsequent suit when the very point is presented for decision" is clear from a reading of the circuit court's opinion, and that it was

a pure dictum about a point not presented for decision is equally obvious.

Of course, the dictum, properly read, is quite consistent with our success, in view of the "if" in it. And all this time there was evidence—had it only been industriously presented—that Congress meant by the act of 1856 to make the lands return by force of the statute alone. It was a very natural meaning, because the Government could not conveniently make entry in the manner of a private individual—and this was as well known then as it is now. It was convenient to have the statute say that the lands should, without such impossible entry, return to the United States. It was natural, too, for Congress to have foresight enough to make an adequate provision, if it was going to make any, as to what should happen to the lands in the event of failure to build. In *Sir Moil Finch's case*, *decided in 33 Elizabeth*, Godfrey, arguing, says: "At this day, where a forfeiture is given to the King, etc., by statute, the words are, 'that the King shall be seized without office.'"

The title to the lands was intrusted to the State for a sole purpose and a fixed time, and there is no conceivable reason why Congress should not have intended the title to them to come back, return, revert, when no longer applicable to that purpose and the time had expired. When the time expired the grant expired and Congress itself so understood.

The evidence of such an intent is found in similar laws expressing the same ideas in other language. For example, the act of September 20, 1850, almost identical in general plan throughout with the act of 1856, makes

grants to Illinois, Mississippi, and *Alabama* for a road from Mobile to Chicago, and section 5 says:

And be it further enacted, That if the said railroad shall not be completed within ten years, the said State of Illinois shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, the title to the purchasers under the State remaining valid; and the title to the residue of said lands shall reinvest in the United States, to have and to hold the same in the same manner as if this act had not been passed.

In an act of March 3, 1845, granting lands to Indiana for a canal, we find in section 4:

And shall be completed within fifteen years from and after the passing of this act, or the State shall be holden to pay to the United States the amount of the price or prices for which any and all land which may have been disposed of by said State may have sold; and such of said lands as may not have been thus disposed of shall, from and after said fifteen years, if said canal shall not then have been completed, revert to *and again become the property of* the United States.

Within two years after the passage of the act of 1850 above quoted, language identical with that of section 4 of our act of 1856 occurs in the act of June 10, 1852, granting lands to Missouri; also in an act of February 9, 1853, granting lands to Missouri. Doubtless, the same men were in Congress to draw and pass these laws.

Act of August 8, 1846, granted lands to Wisconsin, the lands to "be and become the property of said State for the purpose contemplated in this act, and no other,"

prescribing how the lands shall be sold, and, without any provision about getting back title, requiring the State to pay the United States whatever the State may have received "for any of said lands," if the river improvement should not be commenced within three and finished within twenty years.

The Union Pacific act of July 2, 1864, sec. 17, providing for a branch to Sioux City, says: "Provided, however, That if the said company so designated by the President shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all of the railroad which shall have been constructed by said company shall be forfeited to, and *become the property of*, the United States."

And the original Union Pacific act of 1862, sec. 17, provided that "if said roads are not completed so as to form a continuous line of railroad, ready for use, from * * * to * * * by the first day of July, 1876, the whole of all of said railroads * * * together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements and hereditaments, and property of every kind and character, shall be forfeited to and *taken possession of by* the United States."

To these proofs of an intention to provide a substitute for entry in person or inquest of office might be added the contemporary construction by the Interior Department, and the act of April 21, 1876, section 3, referring to that, which act has been held *not* operating to divest vested rights of grantees (13 Fed. Rep., 105):

SEC. 3. That all such preemption and homestead entries which may have been made by permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws and making of the proof required shall entitle the holder of such claim to a patent therefor.

Congress not only asserts ownership and disposes of the lands, but asserts it and disposes of them on the theory that the Land Department had rightly treated them as lands of the Government from "the expiration of the grant."

Then there are a number of laws extending the time fixed in the acts of 1856, which fact indicates that Congress understood that an extension was necessary. The other side seem to think not. In Indian treaties the word "revert" seems to be used as we understand it, e. g., Choctaw and Chickasaw treaty of 1855: "Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said land shall *revert to the United States* if said Indians and their heirs become extinct or abandon the same." And this is spoken of as a "*reversion* provided for." (Creek and Seminole treaty of 1856.) And in providing for patents under grants like ours Congress takes pains to say that "this shall not be construed to revive any land grant already *expired*." (Act of June 18, 1874.)

Of course, reducing the Government, the chief lord, to a mere right of reentry for conditions broken and saying that there should be an inquest of office to establish the fact that the road was not completed are two

essentially different and independent propositions. But we do not think either was contemplated by Congress. The land or title was to "revert"—return—go back; to revert because the statute which granted it required it to revert; revert under the statute, regardless of the common law, the statute being law of equal dignity and force.

Upon what are based the dicta that there must be an inquest of office or something equivalent? Undoubtedly upon the English constitutional maxim that the King shall not seize property held by an individual without his having an opportunity to dispute the fact giving the King a right to the property. This was a very just provision against abuse of the King's prerogative, and obviously its benefit was obtained by an alien or felon or other person by giving him a fair hearing before ousting him, without also depriving the King of his just rights from the time of forfeiture up to the time of the hearing. But this is not American Federal law, certainly not beyond its applicability and reason for being, nor would it be very consistent with other dicta or decisions of this court to the effect that the Government can, by mere legislative fiat forfeiting or disposing of such property, deprive a man of it without any opportunity to dispute the fact. It seems to be wholly inapplicable to our Federal system of dealing with public lands. The Land Office, which would do the only "seizing" that is done, is a permanent tribunal for hearings as to such facts. There is no danger that anyone will be tyrannically ousted by it without a hearing, and "the liberties of Englishmen" need not be brought over to prevent that. Nor do those liberties

of individual English subjects seem very appropriate to a case where the State of Alabama as a sovereignty would be the party requiring the inquest, or to a country where freedom, safeguarded by law, has taken the place of "liberties" qualifying royal power.

The act of 1856 does not use the words "condition subsequent," or other phrase borrowed from the common-law technical names and referring to that law.

If Congress passes a law punishing the crime of murder without defining murder, there is a manifest reference to the common law to find the definition and incidents.

If Congress had said here, simply and without adding statutory provisions covering the incidents and consequences, we hereby enact the condition subsequent that the road must be built within ten years, there would have been a similar reference to the common law.

But the language used in section 4 is plain English and complete without need of being supplemented from without. The word "revert" has no technical meaning confining it to giving a right to reenter for condition broken. Sheppard says it *suffices* to do that—not that it is confined to that. But if we give it a legal meaning, instead of understanding it as simply meaning "return to a former position," what is it? Obviously it is a verb form of the noun "reversion" or the noun "reverter," and has nothing to do with conditions or covenants of any kind. In the Loughrey Case this court treats it as giving a "possibility of reversion" before the event which turned that into a reversion *had happened*. If so, we need no reentry in this case to get title, however it may be as to possession. Gray on Perpetuities,

section 31, points out the difference between the right of reentry and possibility of reverter thus: "After the statute (of *quia emptores*) a feoffor, by the feoffment, substituted the feoffee for himself as the *lord's* tenant. By entry for breach of condition he avoided the substitution and placed himself in the same position with respect to the lord which he had formerly occupied. The right to enter was not a reversionary right, coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest—a returning of the land to the *lord* of whom it was held, because the tenant's estate had determined."

In Preston's Sheppard's Touchstone we are told that condition not to alien the thing granted to anyone whatsoever is void in the case of a common person as repugnant to the estate. "But in case of the King such conditions are good, [on account of the tenure of the King, since, in construction of law, the King is the donor and has a possibility of reverter.]"

According to this view the act of 1856 may well be regarded as intended to give a qualified fee. Why should the chief lord reduce his rights to a mere right to reenter for condition broken when the statute of *quia emptores* did not concern him?

Some contend that the right to have the land revert after a qualified fee is not carved out of the fee, and therefore is not a technical reversion nor technically a feudal *estate*, the fee being the whole estate and this

right something additional. But it is a title and operates by itself a return of the land, as Gray says, and accompanies the fee into whosoever hands it passes. (4 Kent, 9.) And the very notion of fee tenure implies ownership by a lord whose tenant the fee-holder was.

The supreme court of Alabama, in *Sutton & Billups v. Miller*, says:

The rule undoubtedly is that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee but the grantor, his heirs, or successors; and the Government is bound by this principle. But the act of Congress conferring title to these lands was not a mere grant. It was a *sale* as well as a grant.

And it was therefore held that "a sale made in contravention of the letter and policy of the law" was not voidable but void *ab initio*, and so could not be ratified.

Why the complex and unusual matters so beautifully and perspicuously provided for by section 4 of the act of 1856 should be thrown into confusion by trying to treat this law as no more than a private conveyance with an ordinary condition subsequent we do not understand. The explanation may be that this court's frequent decisions upon the more important Pacific road laws led it to suppose, without needing to inquire particularly, that the acts of 1856 were drawn in the same general spirit as those were held to be, whereas they are wholly different and to be interpreted as a distinct system, most carefully developed from prior legislation. They are arrangements with sovereign States and contemplate State action and the relations of government to government, not those of individual to individual.

The very cases which insist on bringing in a right of reentry recognize it as anomalous by requiring, not at all a reentry, but "something equivalent," usually speaking of a judicial proceeding as such equivalent.

As for dicta about the necessity for "inquest of office" in such cases or its equivalent, it is immaterial whether we are to have that or not. It has nothing to do with the nature and time of accruing of the sovereign's rights, but is an inquiry about them. (3 Blackst., 260.) It used to be supposed that a matter of record was necessary to inform the sovereign, and that records should be avoided by records. Of course, the terms of the act of 1856 are all of record, and the failure to complete the road within ten years is shown of record, because the governor's certificates are wanting from the record. "Tenant of the King is attainted of felony, the King is entitled to the land from *the time of the felony* committed; yet, if he take the profits until attainder, he is not an intruder, but he taketh the profits *without title*, and so accountable to the King." (Sir Moil Finch's case, Leonard's Reports.) If the sovereign needs an inquest of office, so as to permit the fact to be disputed or disproved, he is having it now. And now that he is having it, in order to permit a dispute as to the fact which gave him title, he takes title from the date of the fact and not from the date of the inquiry about it.

We do not believe this court, in *Schulenberg v. Harri-man*, meant by its dictum to say that the act of 1856 was a private paper under the common law. *Congress* knew how to say that, or to use words implying that, but it did not do so. It merely announced its will in simple

and original language of its own, impossible to interpret because too plain to be misunderstood. What right would the court have to ignore the language that was used, and substitute language that was not used, but rejected? And as tenant to what lord were the United States to be substituted in 1866 by their right to reenter?

The letter and policy of the law authorized sales for ten years and prohibited sales after ten years; and it is submitted that any sale after ten years was void *ab initio* as to all the world, because the law as a law failed to authorize it to be made (and nothing else could) and prohibited it to be made at the time it was made, forbidding it in the same way and with the same supreme legislative power with which it authorized sales to be made during the ten years. This you may do; that you shall not do, said the law.

The court has no difficulty in calling *void* a sale of lands beyond the 120 sections not preceded by a certificate—in other words, a sale made before the power to sell is to begin—and we are somewhat at a loss to see how that is any more obnoxious than one made after it is to cease. There may be some profound difference beyond the reach of our intelligence. As to the former period of time, the *estate* had vested and was in the grantee, just as it was in the latter period. Both periods are expressly put without and beyond the *power* to sell; sales in both are expressly *forbidden* by the supreme law.

We are not asking the court to contradict *Schulenberg v. Harriman*, since that is not necessary to our purpose. All we need is a decision as to the time when the

forfeiture begins to operate "if" the grantor enforces it, as here, by both legislative and judicial methods. In that case there was no enforcement. Third parties were litigating, and the point in question and decided was that because there was at no time, and, for aught that could be known, never would be, such enforcement by the grantor, a mere trespasser on the lands could not take it upon himself to despoil the property and the State be powerless to prevent him under State laws made for that purpose.

We do think, however, that the confusing *Schulenberg dictum* should be ignored, since nothing can be clearer than that the statute intends it to be a condition *precedent* to the sale of an acre of land which remains "unsold" at the end of ten years that the road shall have been previously completed.

The dictum says that the provision that all lands remaining unsold shall revert is no more than a provision that the grant shall be void if a condition subsequent be not performed, and that the prohibition of further sales adds nothing to the force of the provision, because if the lands are to revert that implies that no further sale is to be made. If this were the intent then the provision about reverting would *operate* only as does a provision that a grant should be void if a condition subsequent is not performed. But does it? Where such provisions are found, all sales after breach are subject to the condition subsequent and the grantor is fully protected against the purchasers. Here, we are told, the grantee could proceed to sell free of the supposed breach of condition. The grant is *then void* of the lands *then* unsold, to wit, only

those of them that may be unsold many years after "then." As to the rest of them, it does not *then* become void, or anything other than in full force and effect. And that result, of itself, points to a different construction of the statute, for it is well settled by adjudications of this court that a construction favorable to the public rights and interests must always be preferred, if one is possible. (*Sioux City R. R. v. United States*, 159 U. S., 349.) It certainly is not *impossible* to say that Congress intended what it plainly said, and certainly is not *unavoidable* to hold that Congress meant that its language should be "no more than" a provision that the grant should be void if a condition subsequent should not be performed. One way to save the dictum seems to be to make it mean that the express power to sell an indefeasible title is put an end to by the provision that the land shall revert, leaving the title and a power to sell growing merely out of the continued existence of title in the grantee. Such a power to sell would, as already suggested, be to sell subject to the grantor's rights growing out of the breach. The passage of the *estate in presenti* by the words "be and is hereby granted" does not carry with it the passage *in presenti* of the power to sell, to which that phrase does not apply. That is a distinct thing from the estate and may as well terminate before it as begin after it, which it certainly does as to lands beyond the first section.

But we see no special reason for attempting to save a dictum which is so foreign to the point decided in the case, and so opposed to the primary rule of construction, that where language is plain it shall be held to mean simply what it says. There is no rule of construction,

though one seems to be needed, that plain language does not mean the *opposite* of what it says.

We think the Loughrey opinion goes sufficiently far for our purpose, in the direction of ignoring *Schulenberg v. Harriman*, when, in the course of it the court abandons the theory of a mere right of reentry for condition broken and distinctly affirms the inconsistent theory of "a possibility of reversion, a contingent remainder." This gives us a limitation instead of a condition, gives us an *estate*, and not only so, but the contingency has happened, so that the estate has "vested in possession." The court's remark about overruling the *Schulenberg Case* shows that it knew it was disregarding it, except as to the very point decided—"the right to the timber so cut as against the trespassers"—and was rather disposed to overrule it as to that, which logically seemed to be a necessary consequence of its theory of a remainder.

The dissenting opinion in the Loughrey Case, concurred in by the Chief Justice and Justices White and Harlan, goes far beyond what we need in this case, and the very point decided by the majority was that there was not, at the time of conversion, an immediate right of possession of the timber, as distinguished from the land and as distinguished from a right to an accounting as to the value of the timber, if recovered by the State.

We are asking the court to say that while, *quoad* third persons, the title remained that of the State "if" there was at no time any enforcement of its rights by the Federal Government; *quoad* the grantor the *power of alienation* which accompanied the estate was precisely what the law said it should be and terminated at the end

of ten years, because the law expressly said it should do so in the event which happened.

There *being*, at any time, an enforcement by the Government of the "condition" that the land shall *then* revert and no further sales be made, all sales in violation of law and when there was a termination of the power to sell, are now and here to be regarded as void *ab initio*. If the court will not say this, it must still decide in our favor.

Kent says (vol. 4, 126): "It is a general principle of law that he who enters for a condition broken becomes seized of his first estate, and he avoids, of course, all intermediate charges and incumbrances."

Neither need we ask the court to hold that the granting act made the State a trustee. In *Tucker v. Ferguson* (22 Wall., 527) the court distinctly affirms that the State "became the *agent* and *trustee* of the United States." What the court in that case decided was that Osceola County, Mich., which is *more than 40 miles east* of Pere Marquette (now Ludington), could tax lands in the county, "when the State, proceeding in the execution of the trust, had transferred her entire title to the company and they had perfected their title and *acquired the right to sell*," which they had done by building west to *within 40 miles of Pere Marquette* (p. 536). By an amendatory law "the reverter was limited to the lands to which the right to sell had not attached," and the whole road was completed before the case was decided (p. 543). See also *Sioux City R. R. v. United States* (159 U. S., 349). In a similar law (act of July 4, 1866), granting lands in the

same way to Missouri and Arkansas "to aid in the construction and extension of a railroad," Congress refers to its grant as "vesting the title to the lands herein recited *for the trust purpose aforesaid.*" If there was a trust in our case, it failed and expired, and thereupon the Government's equitable and beneficial estate drew to it the legal ownership.

The law of Alabama accepting the grant and turning the whole over, without consideration, to the Tennessee and Coosa Company could not have been intended as a sale within the meaning of the act of Congress, because it is not to be supposed that the State would violate the trust at the time of accepting it by selling all lands in advance of the certificates of completed road, and otherwise than "only as the work progresses;" neither could it be such a sale, because, as the State was to hold the lands, was to sell them, and they—that is, of course, the *proceeds* of their sale—were to be "exclusively applied in the construction of" the road, the act of Congress clearly used the word "sale" in the ordinary sense—an exchange for a "price or prices" or an "amount" of money (see statutes of 1845, etc., above quoted; otherwise the sales would give no proceeds to apply. As a government acts only through agents, the transfer to the company was but a convenient way of avoiding the establishment of a State land department to sell the lands. However, the appellees have no confidence in the supposed proposition and do not make it, and the trial court could not well rely upon it after what it said about imputing an act of bad faith to a State government. And see quotation above from *Tucker v. Ferguson*.

As to anything contrary to what we contend for found in the *Schulenberg* opinion, we again suggest Chief Justice Marshall's maxim and the following often quoted and approved remarks of Judge Carruthers (1 Sneed, Tenn., 695):

The members of a court may often agree in a decision—the final *result* in a case—but differ widely as to the reasons and principles conducting their minds to the same conclusion. It is, then, the conclusion only, and not the process by which it is reached, which is the opinion of the court, and authority in other cases. The law is thus far settled, but no further. The reasoning adopted, the analogies and illustrations presented, in real or supposed cases, in an opinion, may be used as argument, but not as authority. In these the whole court may concur, or they may not. So of the principles concurred in and laid down as governing the point in judgment so far as it goes, or seems to go, beyond the case under consideration. If this were not so the writer of an opinion would be under the necessity in each case, though his mind is concentrated upon the case in hand and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations, and qualifications which every variety of facts and change of phase in cases might render necessary.

The *Schulenberg* and *Willamette Valley* cases speak of what happens when there is "absent" from the controversy the grantor and his insistence upon his rights.

No question of title was necessary to the decision of the former case. That case ought to have been decided the same way, though the United States lands in the

State had never been granted at all, for a State can by law protect lands of the United States from trespassers and probably is in duty bound to do so, as it protects the property of all others within its borders.

The act of 1856 is a law, and all is void that it forbids or lies beyond the power it creates to deal with public lands of the United States. If it is a mere grant, it is a sovereign grant by the "chief lord" and gave a qualified fee, which came back according to the terms of the grant in 1866. No title could thereafter be given to third parties by the grantee. Or we can call it a grant giving a conditional reversion, and the condition happened; or "a possibility of reversion," and the possibility became an existent fact; or a trust, and the trust failed; or a "contingent remainder," and the contingency took place.

But if it must be that there was only a grant with a condition to reenter upon breach, the forfeiture was incurred, and the grantor has taken advantage of it and "avoids all intermediate charges and encumbrances." On any reasonable construction of the act of 1856 we are entitled to a favorable decision.

We again venture to suggest our preference for the startling and original theory that the act of 1856 was and is the law of this matter and that the same is too plain to admit of interpretation.

Before closing this brief we desire to point out the evidence that the \$111,000 paid Carlisle in April, 1888, was not additional to the lands alleged to have been sold him, but took the place of those lands, his "claims to the lands of this company" being then relinquished to the

company. This will be found on record pages 143, 168, and 141. It is settled that one who is not a bona fide purchaser can not become one by transferring to a bona fide purchaser and then buying the title back.

As we have suggested in the other brief, there is no real adjudication of the *facts* upon which must depend the question whether in law Carlisle is a *bona fide* purchaser. This court will perceive this on determining upon what facts that legal question must depend. Hence there should be no hesitation in making an original examination of the evidence if the question is deemed of any importance.

That Littleton is in section 20, T. 11, R. 5 E. (12 Land Dec., 255), and that, therefore, not more than half the lands in Carlisle's quitclaim are opposite constructed road, is a matter of which the court will take judicial notice. They lie along the 6 miles of road between Littleton and the point 20 miles from Guntersville, in section 29, T. 10, R. 5 E., as shown upon a Land Office map, which we expect to exhibit to the court.

It may well be questioned whether any lands were opposite completed portions of road within the meaning of the act of September, 1890, no section of 20 miles having been completed. Why should the forfeiting act not intend to forfeit all "unearned" lands not legitimately "sold?" All were "unearned" in this case, and none legitimately sold. (*Sioux City R. R. v. United States*, 349.) We do not see why the forfeiture law was not *in pari materia* with clauses universally contained in the granting acts. Roads whose partial completion had made lands irreclaimable were *so far* not included in

the act taking advantage of failures under previous laws. We do not base this argument on the word "portion," but on the probability of an intent to make the act which was enforcing forfeiture for failure to complete as broad as that forfeiture for failure to complete, as incurred under the universal terms of the granting acts.

That the court may have no lurking notion that the Government is dealing harshly in this matter, reference is made to the Alabama acts of 1854, 1860, and 1870, showing that the Federal Government has paid \$250,000 for this road, of which our company built a useless fragment of 5 miles, to the case of *Tennessee and Coosa R. R. Co. v. East Alabama R. Co.* (73 Ala., 426), and the acts of the State referred to in the syllabus of that case.

Respectfully submitted.

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